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Constitutional Law--Separation of Powers--Issuance of Municipal Charter by Circuit Court

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when the submission calls for two arbitrators, who are to select an umpire in case of disagreement, an award rendered by two of the three is valid, *Stiringer v. Toy,* 33 W. Va. 86, 10 S. E. 26 (1889); *cf. Rogers v. Corrothers,* 26 W. Va. 238 (1885), but that one selected acting as an original arbitrator or appraiser in making an award has been held reason to vitiate the award. *Providence Washington Ins. Co. v. Morgantown Board of Education, supra* (alternative holding).

P. N. B.

CONSTITUTIONAL LAW—SEPARATION OF POWERS—ISSUANCE OF MUNICIPAL CHARTER BY CIRCUIT COURT.—A group of citizens of the community of Chesapeake petitioned the circuit court of Kanawha County to issue a certificate of incorporation to the town of Chesapeake as a municipal corporation, under the provisions of W. VA. REV. CODE (Michie, 1943) c. 8, art. 2, the provisions thereof being satisfied. The circuit court dismissed the petition, holding that W. VA. CONST., Art. V, made the statute void and unconstitutional in that it required a circuit court to perform a purely legislative function. *Held,* on writ of error, constitutional, affirming a line of decisions beginning with In re *Town of Union Mines,* 39 W. Va. 179, 19 S. E. 398 (1894), on grounds of public policy. In re *Town of Chesapeake,* 45 S. E. (2d) 113 (W. Va. 1947).

The delegation of power to the courts to issue charters to municipal corporations has been the subject of much dissension among the courts of the various states. Some have held the delegation in this type of case void in all instances as a violation of the doctrine of separation of powers. *Udall v. Severn,* 53 Ariz. 65, 79 P. (2d) 347 (1938). Others have held it valid if there is no exercise of discretion on the part of the court, but only a determination of the facts as to compliance with the statute, the court performing a ministerial duty in issuing the charter. *State* ex rel. *Fire District v. Smith,* 353 Mo. 807, 184 S. W. (2d) 593 (1945). Still others, as in the instant case, hold that although a certain amount of discretion is involved, it is a valid delegation which does not violate the constitution. *Board of Supervisors v. Duke,* 113 Va. 94, 73 S. E. 456 (1912); *Morris v. Taylor,* 70 W .Va. 618, 74 S. E. 872 (1912). It had been apprehended that the application of the "new and strict" rule, see In re *Town of Chesapeake,* 45 S. E. 113, 117 (W. Va. 1947), of *Hodges v. Public Service Comm.,* 110 W. Va. 649, 159 S. E. 834 (1931), might cause a repudiation of the results in situations where comparable delegations of power had theretofore been sustained. Davis, *Judicial Review of Administrative Action in West Virginia—A Study in Separation of*

Powers (1937) 44 W. VA. L. Q. 270. In other connections, such a tendency has in fact appeared. Compare *Sims v. Fisher,* 125 W. Va. 513, 25 S. E. (2d) 216 (1943), with *McClure v. Maitland,* 24 W. Va. 561 (1884). In the instant case, the court concedes that had the *Union Mines* case been decided on the rule in the *Hodges* case, a different result would have been reached, yet adheres to the result actually reached as one of the "exceptions to what we have come to believe is the sound rule as to the separation of powers." Early American constitution makers did not intend the separation of powers to be complete nor to stand in the way of a delegation of legislative power, but contemplated only that no power definitely assigned to one branch could belong to or definitely be assigned to another branch. Cheadle, *The Delegation of Legislative Functions* (1918) 27 YALE L. J. 892. It has been judicially recognized that no absolute fixation and rigidity of powers between the three departments of government were envisaged where the necessities of government are involved. See *Morris v. Taylor,* 70 W. Va. 618, 624, 74 S. E. 872, 875 (1912); *Ferretti v. Jackson,* 88 N. H. 296, 299-302, 188 Atl. 474, 476-8 (1936); *Springer v. Government of Philippine Islands,* 277 U. S. 189, 211 (1928) (dissenting opinion by Justice Holmes). The approach of the court in the instant case portends no wholesale relaxation of the "new and strict" doctrine of the *Hodges* case. But it does show that on occasion logic will bow to reason and particular modifications of the *Hodges* doctrine be permitted. The result, at least, seems eminently practical and sound.

W. E. P.

CRIMINAL PROCEDURE—INDICTMENT—OFFENSE LAID ON A DATE SUBSEQUENT TO INDICTMENT.—Defendant was convicted of nonsupport on an indictment containing two counts, one of which alleged that defendant "within one year *from* the finding of the indictment, on the .... day of December, 1946, and from said date to the finding of this indictment, did without just cause desert and wilfully neglect and refuse to provide for the support of his infant children." (Italics supplied). The indictment was returned at the April term in 1946 and the case tried in July, 1946. Before entry of judgment, defendant's motion to set aside the verdict and a new trial was overruled and defendant excepted. *Held,* that the indictment was good and the motion to quash, on the grounds that the indictment charges the commission of an offense subsequent to the return thereof, was properly overruled. *State v. Rector,* 43 S. E. (2d) 821 (W. Va. 1947).